83 - 2066

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RAY REINHOLD, *et al.*,
Petitioners,

v.

FEE FEE TRUNK SEWER, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

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QUESTIONS PRESENTED

Whether dismissal of a cause of action, constitutes an infringement of the equal protection of the laws in violation of the Fourteenth Amendment, if the cause of action states that certain utility rate customers must pay a second time through a rate surcharge, for the same assets they previously paid for and donated to a utility as contributions in aid of construction, so that utility stockholders can receive a return on these assets which the stockholders never invested in the utility, and said return is over 120 times greater than the stockholders' original investment.

LIST OF PARTIES

Parties to this proceeding are as follows:

Ray Reinhold, Margaret Kelahan, Michael Miller, Juliana Locket and Katherine Horn, as Members of the Carroll Wood Condominium Board of Managers;

Ray Reinhold, Virginia Reinhold, Margaret Kelahan, Michael Miller and Juliana Lockett, Individually; and

Richard Bardes, Noma R. Baker, Connie Ferguson, Meredith Walter Mott and Mary Heeb, as Members of the Sakura Gardens Condominium Board of Managers;

On behalf of themselves and all other real property owners served by Fee Fee Trunk Sewer, Inc.,

Petitioners,

v.

Fee Fee Trunk Sewer, Inc., a Missouri corporation,

Sterling R. Kennedy,

Edwin C. Ryder, Jr.,

Ray LaBrayere,

George H. Wood,

Edwin C. Ryder, Sr.,

John Fischer,

Lawrence Frichtel,

Russell A. Grantham, and

John N. Leach,

Individually

Edwin C. Ryder, Jr., Russell A. Grantham, John N. Leach, Ray LaBrayere, Sterling R. Kennedy, and George H. Wood, as Statutory Trustees of Fee Fee Trunk Sewer, Inc.

Russell A. Grantham, Trustee of the Fee Fee Liquidating Trust and

The Metropolitan St. Louis Sewer District, a Municipal corporation.

Respondents.

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Cases:

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

Petitioners, Ray Reinhold et al., pray that a writ of certiorari issue to review the judgment of the Missouri Court of Appeals, Eastern District entered January 10, 1984 affirming the dismissal of their cause of action because the petition failed to state a claim on which relief can be granted, and that on hearing the judgment be reversed and the petition reinstated for further proceedings.

OPINIONS BELOW

The denial of the application to transfer to and by the Supreme Court of Missouri (App. B) is not reported.

The opinion of the Missouri Court of Appeals, Eastern District is reported at 664 S.W.2d 599 (Mo.App. 1984)(App. A).

No opinion was rendered by Division Eight, Circuit Court for the Twenty-First Judicial Circuit of Missouri.

JURISDICTION

The judgment of the Missouri Court of Appeals, Eastern District was dated and entered on January 10, 1984. Timely motions for rehearing and transfer to the Supreme Court of Missouri were filed and were denied on February 17, 1984. Timely application for transfer to the Supreme Court of Missouri was filed and denied on March 20, 1984. This petition for certiorari was filed within 90 days of that date.

This Court has jurisdiction under 28 U.S.C.A. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, Constitution of the United States;

393.130 R.S.Mo. (1978).

STATEMENT OF THE CASE

Plaintiff rate payers filed their second amended petition which alleges they (or their predeceasors in interest) donated assets to a privately owned sewer company (Defendant Fee Fee Trunk Sewer, Inc.) during its active operation, as contributions in aid of construction. Such contributions in aid of construction can originate a number of ways. Typically a developer builds a subdivision complete with storm and sanitary sewers. The developer deeds legal title to these sewers to the sewer company in return for receiving sewer services. The sewer company pays no money for the sewers. The developer recovers the cost of building the sewers by increasing the cost of the homes.

In the second amended petition, the rate payers allege the value of these contributions in aid of construction as substantially in excess of $1,000,000.00. An excerpt from Fee Fee's balance sheet puts these contributions in aid of construction at $27,923,930.00 on December 31, 1976. This balance sheet value does not reflect the present value of these assets, any deprecia-

tion of the assets, or any amounts expended by Fee Fee to repair or maintain the assets. All stockholders of Fee Fee invested a total of $82,800.00 in the corporation.

On April 27, 1977, Fee Fee and Metropolitan St. Louis Sewer District (MSD), a municipal corporation, entered into an agreement of Purchase and Sale whereby MSD was to acquire these assets of Fee Fee. The purchase price was $12,000,000.00 subject certain adjustments. The sale to MSD included transfer of Fee Fee's assets known as the contributions in aid of construction. There was no provision in the Agreement for a refund or payment to the Plaintiff class of any portion of the purchase price attributable to contributions in aid of construction.

MSD issued revenue bonds in order to raise $10,000,000.00 of the purchase price. The remaining $2,000,000.00 was paid in the form of notes to be funded from connection fees and certain other accounts. The Fee Fee subdistrict (i.e. the plaintiff class) pays for the revenue bonds by a surcharge to their sewer rates. Other rate payers of MSD do not pay this surcharge.

The sale was closed and MSD paid $10,000,000.00 to Fee Fee on January 3, 1978. Three more payments totalling $900,000.00 were paid within less than two years. The shareholders of Fee Fee received from $230,000.00 to $3,200,000.00 each, depending upon their percentage of ownership. None of the purchase price was distributed to the plaintiff class.

Plaintiffs originally filed suit on January 2, 1978. Fee Fee's motion to dismiss was overruled. Fee Fee sought and obtained a preliminary writ of prohibition. On March 4, 1980, the Missouri Court of Appeals, Eastern District quashed the preliminary writ in an opinion reported at *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz,* 596 S.W.2d 466 (Mo. App. 1980). The case was remanded to the circuit court on April 16, 1980.

On June 25, 1980, Plaintiffs filed their first amended petition. On September 4, 1980, a short evidentiary hearing was held on the question of certification as a class action. A plaintiff class

of approximately thirty-eight thousand in number was certified by Judge Litz on January 7, 1981. In the meantime, Judge Litz became Presiding Judge of the St. Louis County Circuit Court and the case was assigned to Division No. 8, the Honorable Robert G. J. Hoester.

On January 7, 1982, plaintiffs filed a second amended petition which named additional defendants. All defendants moved to dismiss the second amended petition. On June 25, 1982, the trial court conducted a hearing on the motions and ordered the case dismissed with prejudice.

Plaintiffs filed their appeal with the Missouri Court of Appeals, Eastern District. On January 10, 1984, the Court of Appeals affirmed the trial court's dismissal. The Court of Appeals denied on February 17, 1984, plaintiffs' motions for rehearing and transfer to the Missouri Supreme Court. The Missouri Supreme Court denied on March 20, 1984, plaintiffs' application for transfer.

How the federal question was presented.

Plaintiffs' first amended petition includes, as paragraph 22, the following sentence: "Defendants' actions are contrary to Amendment XIV of the Constitution of the United States of America, which forbids any state from denying any person within its jurisdiction the equal protection of the law." Plaintiffs' second amended petition includes the same sentence as paragraph 53.

Defendants' motion to dismiss for failure to state a claim, requires judicial interpretation of the entire second amended petition. As an unavoidable part of their duty to review plaintiff's petition on a motion to dismiss, the trial court and court of appeals must also interpret plaintiffs' claim in paragraph 53 that the defendants violated the equal protection of the law which is part of the Fourteenth Amendment to the United States Constitution.

The Court of Appeals' decision at page 9 states that no other issues need be addressed or interpreted specifically because: "There is no such cause of action under the statutes or case law on this type of utility transaction."

In their motion for transfer to the Missouri Supreme Court, plaintiffs specifically stated at part 2, C that the Court of Appeals' decision interprets the equal protection clause of the Fourteenth Amendment and in violation thereof requires plaintiffs to pay twice for certain assets so utility stockholders can receive a return on property they never invested.

In their application for transfer to the Missouri Supreme Court, plaintiffs specifically stated as Part 2, C that the Court of Appeals' decision interprets the equal protection clause of the Fourteenth Amendment and in violation thereof requires plaintiffs to pay twice for certain assets so utility stockholders can receive a return on property they never invested.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The *Covington* Standard Of A Just Rate.

Covington & Lexington Turnpike Road Co. v. A. P. Sanford, 164 U.S. 578, holds that a utility can only demand, without violation of the Fourteenth Amendment's requirement of equal protection, such compensation as will be just, both to itself and to the public under all the circumstances of the case. "The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends." (See page 596.)

Contrary to the standard in *Covington,* the defendant stockholders have demanded and received, through a rate surcharge, amounts greatly beyond any compensation or indemnity for their capital invested in the sewer company. The stockholders received a return more than 144 times greater than their total, original, capital investment ($12,000,000.00 ÷ $82,800.00 = 144.9). Contrary to any principle of indemnity, defendants feel the stockholders are entitled to "all they can get" from rate payers in the MSD subdistrict. A recent statement of the indemnification principle is in *Valuation Proceedings Under Section 303(c) and 306 of the Railroad Reorganization Act of 1973,* 445 F. Supp. 994 (Special Court 1977).

Defendants and the courts below have placed no limitation upon the amount stockholders can receive for assets transferred to a successor utility. In theory, it appears that numerous succeeding utilities could surcharge the public again and again for the repurchase of assets originally supplied by the rate payers themselves.

According to *Covington,* it appears just for rate payers to pay only once for utility assets and these "paid up assets" would remain so through private and public rate calculations and any sale of the property. Numerous other states have widely an-

nounced and followed this segregation of rate payer-derived assets. Missouri has segregated rate payer assets for calculation of state regulated utility rates. See *State ex rel. Valley Sewage Co. v. P.S.C.*, 515 S.W.2d 845 (Mo. App. 1974). *City of Hagerstown v. P.S.C.*, 141 A.2d 699 (Md. App. 1958) at 704 and 705 explains the basis for such segregation:

> [I]t is unequitable to require consumers to pay to the utility a return on property which they, not the utility, have paid for. . . . In other words, the water company (here the City) is simply in the position of a trustee, holding legal title to the contributed property for the benefit of those with whom it has contracted, or their successors in interest.

An entirely different situation is a suit for refund of utility rate overcharges. Customers claiming rate overcharges have no pre-existing interest in the company's property and no lien or contractual right which they could enforce against its property. (See *City of Hagerstown* at page 705).

At times, some defendants have implied that plaintiffs lost all rights to their contributed property, because voters within the MSD subdistrict approved, as one package, the purchase of Fee Fee's assets and the financing by MSD revenue bonds. Such an interpretation makes plaintiffs' property rights unlawfully subject to majority vote.

2. The Decision Below Is Based On An Arbitrary And Unreasonable Classification.

As stated in *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, a utility rate classification does not violate the equal protection of the law if the classification is reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. However, this case creates an artificial and special class of seven stockholders who benefit from the sale of assets while an artificial and special class of thirty-eight thousand rate payers has the special burden to pay for those benefits.

The privately owned sewer corporation was too thinly capitalized to construct its own sewer lines. Therefore, rate payers paid for and donated sewer lines to receive sewer services. Later, MSD bought Fee Fee's assets and an MSD surcharge requires a second ratepayer purchase of those contributed assets to create a huge "bonus" return for Fee Fee's stockholders. Such a double payment by rate payers creates an unreasonable and arbitrary classification which has no fair and substantial relation to proper utility regulation.

Missouri statute law at 393.130(3) R.S.Mo. appears to clearly forbid such arbitrary and unreasonable classification:

> No...sewer corporation shall make or grant any undue or unreasonable preference or advantage to any person...in any respect whatsoever, or subject any particular person ...to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Defendants and the courts below have provided no material principle of public policy to prejudice rate payers by their second purchase of assets which they already provided to the sewer corporation at their cost. There appears to be an arbitrary exercise of power based on an improper and unjustified distinction of a sale to a municipal corporation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Missouri Court of Appeals, Eastern District.

Respectfully submitted,

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Counsel for Petitioners

June 14, 1984

APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: ATTORNEYS OF RECORD

FROM: JAMES A. ROCHE, JR., Clerk

DATE: FEBRUARY 17, 1984

Please be advised that the following Motions For Rehearing and/or Transfer to the Supreme Court have been DENIED as of February 17, 1984:

43640	Marjorie E. Chapman, et al. v. James E. Dunnegan, et al.
44907	Custom Craft Tile, Inc. v. Engineered Lubricants Co.
45482	Farmers & Merchants Bank of St. Clair v. Borg-Warner Acceptance Corp.
45488	State of Missouri v. Alpha Jackson
45589	State ex rel State Highway Comm. v. Ray W. Spell, et al.
46121	**Ray Reinhold, et al. v. Fee Fee Trunk Sewer, Inc., et al.**
46164	State of Missouri v. Larry P. Thomas
46168	State of Missouri v. James Westrich
46461	State of Missouri v. Gregory Allen Manning
46673	State ex rel John Ashcroft, et al. v. Larry A. Church, etc, et al.
46722	Mainstreet Enterprises v. Supervisor Liquor Control
46767	State of Missouri v. James Newton Gilmore
46870	State of Missouri v. Sylvester Greenlaw

46992	State of Missouri v. Kenneth Bevly
47040	State of Missouri v. David Stanley
47041	State of Missouri v. Keith Butler
47104	Albert Rucker v. State of Missouri
47187	Eugene Jolliff v. State of Missouri

JAR:kd

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION FIVE

No. 46121

RAY REINHOLD, et al.,
Plaintiffs-Appellants,

vs.

FEE FEE TRUNK SEWER, INC., et al.,
Defendants-Respondents.

Appeal from the Circuit Court of St. Louis County
Hon. Robert G. J. Hoester, Judge

OPINION FILED: January 10, 1984

Plaintiffs, who are owners and managers of real property, appeal the dismissal of their petition for a class action seeking to recover certain assets, "contributions in aid of construction," totaling $1 million paid by them to a privately owned utility, Fee Fee Trunk Sewer, Inc., (Fee Fee) when Fee Fee sold its assets to the Metropolitan St. Louis Sewer District (M.S.D.), a municipal corporation. M.S.D. continued to provide existing sewer service. These contributions arise when a housing developer puts in sewers, deeds them to the sewer company without charge, but then recoups the cost from an increased price for the home, or when a sewer company makes a connection charge in return for building a sewer to service the property.

The second amended petition, which was dismissed as to all defendants, contained the following:

Plaintiffs are members of Board of Managers of two condominiums that were served by Fee Fee. They sought class certification.

The defendants are Fee Fee, a Missouri corporation providing sewer service, individuals who comprised the last board and were shareholders of Fee Fee, and M.S.D., a municipal corporation that bought out Fee Fee.

The contributions (in excess of $1 million) in aid of construction were donated by real property owners in St. Louis County for their beneficial interest in the defendant Fee Fee providing them sewer service.

On April 27, 1977 a contract was made for sale of Fee Fee to M.S.D. for $12 million, effective December 31, 1977. $10 million of the purchase price came from M.S.D.'s sale of revenue bonds, and plaintiffs' payment of a surcharge on their bills to pay for the bonds in contravention of Section 393.130 RSMo 1978.[1]

The prayer was for a constructive trust of $11 million as to the contributions in aid of construction, an action in equity for damages of $11 million, and for an equitable lien of $10 million of after-acquired assets.

Other facts seem in order. Fee Fee, though privately owned, was subject to the jurisdiction of the Public Service Commission (PSC) for its sewer service to St. Louis County. Therefore the terms of the sale by Fee Fee had to be approved by the PSC. The PSC approved the sale and the terms of the contract. Further, the voters in the area served by Fee Fee in an election approved the annexation of the area by M.S.D. and the issuance of revenue bonds to be paid by a surcharge from themselves as customers to finance the purchase.

The original petition in this case was filed only against defendant Fee Fee. After certification as a class action under Rule

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[1] All statutory references are to the Revised Statutes of Missouri 1978.

52.08, amended petitions were filed adding M.S.D. and the individual shareholders and last directors of Fee Fee as defendants. The motions to dismiss as to all the defendants was sustained.

The plaintiffs' five points on appeal and twenty-two subpoints form a collage of diverse and fragmented matters. They primarily claim the trial court lacked the power to dismiss and thus erred in dismissing their petition since it did state a claim. Their other points deal with a statute of limitations issue, whether the petition had been properly amended, and the existence of a fiduciary relationship. All plaintiffs' points are denied and the trial court's dismissal is affirmed as to all defendants.

I.

Plaintiffs, in their first point on appeal, relate several procedural defects which, they argue, nullify the trial court's dismissal of the action. In the first sub-point, the plaintiffs argue that the trial court erred in sustaining defendant Fee Fee's Motion to Dismiss because it was bound by the decision of the court of appeals in *Fee Fee Trunk Sewer, Inc. v. Litz,* 596 S.W.2d 466 (Mo.App. 1980). This prior determination, they assert, held that the appellants had set forth a proper cause of action against Fee Fee.

This point is without merit. It is true that the law as applied to the facts in an appellate opinion constitutes the "law of the case." On remand to the trial court, however, matters which were not decided by the appellate court are not within the operation of this rule. *State ex rel. Mercantile National Bank At Dallas v. Rooney,* 402 S.W.2d 354, 361 (Mo.banc 1966). *Cf. Brooks v. Kunz,* 637 S.W.2d 135, 138 (Mo.App. 1982) (the appellate decision is the law of the case on all points *presented* and *decided*). In *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, supra,* the issue of whether or not the plaintiffs stated a proper

cause of action against Fee Fee was never addressed or decided. This was a writ matter limited to the question of whether or not the plaintiffs would be forced to exhaust administrative remedies before bringing any court action *Id.* at 468. The doctrine of the "law of the case" did not act to prohibit the trial court from sustaining Fee Fee's present motion.

Continuing their theme of the law of the case, the plaintiffs in their second sub-point argue that since one trial judge had certified the class, a successor judge could not entertain a motion to dismiss. It is true that a successor judge is without power to render a judgment, without stipulation of the parties, on testimony heard by his predecessor. *Smith v. Smith,* 558 S.W.2d 785, 790 (Mo.App. 1977). Their argument fails because the testimony and evidence on certification heard on a Rule 52.08(b)(3) class is only to determine, among other things, common questions of law or fact and whether a class action is superior to other methods of adjudication. The merits of plaintiffs' claims were not heard in the certification hearing. The certification itself is not chipped in stone, and, as any certification order, "may be altered or amended before decision on the merits." Rule 52.08(c)(1).

The other sub points denominated "C", "D", and "E" under Point I in the amended points relied on and argument of the plaintiffs' brief are without merit. Point "C" is but a restatement of the two points just addressed. The citations of authority are not germane and tantamount to being "naked of citations." *Bishop v. Bishop,* 618 S.W.2d 261, 263 (Mo.App. 1981) Rule 84.04(d). Likewise point "D" which state "that one trial judge hear all litigation relating to complex class action[s]" is required under Due Process, is but a reargument of the first two sub-points and misses the mark on the effect of class certification. It does not recognize that certification as a class action does not insulate the petition from later dismissal for failure to state a claim, *Kahan v. Rosenthiel,* 424 F.2d 161, 169 (3rd Cir. 1970) *cert. denied* sub nom., *Fertig v. Blue Cross of*

Iowa, 68 F.R.D. 53, 57 (D.C. Iowa 1974). Sub-point "E" contains no citation of authority, and no explanation is given as to the point being of first impression. It too is denied. Rule 84.04(d). *Bishop v. Bishop, supra.*

II.

In reviewing the allegations of a petition dismissed for failure to state a cause of action, the appellate court, after construing all averments favorably to the plaintiff, must determine whether the averments invoke principles of substantive law upon which relief can be granted. *Shapiro v. Columbia Union National Bank & Trust Co.,* 576 S.W.2d 310, 312 (Mo. banc 1978); *Concerned Parents v. Caruthersville Sch. D.,* 548 S.W.2d 554, 558 (Mo. banc 1977). A motion to dismiss for failure to state a cause of action is well taken where the petition fails to plead the essential facts for a recovery. *Young v. Lucas Construction Co.,* 454 S.W.2d 638 (Mo.App. 1970). In arguing that their petition does indeed state a cause of action, the plaintiffs rely on two separate principles of substantive law — first, under the equitable concept of "bilateral fairness" and second, under the auspices of Section 393.130(1). The plaintiffs are not entitled to relief under either principle, and the trial court's order dismissing the action is affirmed.

The plaintiffs argue that the equitable principle of "bilateral fairness" prohibits a privately-owned utility and its shareholders from receiving a monetary benefit for those assets contributed by the ratepayers. The concept of bilateral fairness, their argument goes, allows a utility to receive a return only on its own investment, and not on the investment of its customers — thus, the return derived from the sale of the "contributions in aid of construction" should inure to the benefit of the ratepayers.

In support of this position, the plaintiffs cite several cases in which courts have held that "contributions in aid of construc-

tion" may not be included in determining the "rate base" for ratemaking purposes. *State ex rel. Martigney Creek Sewer Co. v. Public Service Commission,* 537 S.W.2d 388 (Mo.banc 1976); *State ex rel. Valley Sewage Co. v. Public Service Commission,* 515 S.W.2d 845 (Mo.App. 1974). These cases do not help the plaintiffs. Both are authority only for the proposition that a utility may not have these contributed assets considered toward justifying a *rate* increase to customers. The courts hold to do so would result in two inherent inequities: first, to allow the utilities to include these "contributions" in the rate base is to ask the utility customers to pay twice for the same thing. *State ex rel. Martigney v. Public Service Commission, supra,* at p. 394; second, it allows the utility's shareholders to receive a return on money which they never invested. *State ex rel. Valley Sewage Co. v. Public Service Commission, supra,* at p. 851.

The plaintiffs cite no authority for the proposition that they are entitled to share in the proceeds received from the *sale* of "contributions in aid of construction" where the purchasing company continues service to the property owners.

Even more damaging to the plaintiffs' position is their failure to plead any facts that show them to have any right, title or *property* interest in these amounts for which they claim they should be paid. *Cf. Broome & Conkling v. City of Gladstone,* 570 S.W.2d 801, 803 (Mo.App. 1978). They say in their petition that Fee Fee "received legal title to assets as contributions in aid of construction." Their own petition limits them to claiming an equitable interest in these contributions, but they present no facts that would give rise to their ever getting legal title. As our Supreme Court has noted, an equitable title is the right in the party to whom such title belongs to have the legal title transferred to him upon the performance of a specified condition. *State ex rel. City of St. Louis v. Baumann,* 153 S.W.2d 31, 348 Mo. 164 (Mo. 1941).

In order to have a right to the proceeds from the sale of the "contributions in aid of construction," the ratepayers would

have to show that legal title in such "contributions" would revert to them upon the occurrence of some specified condition. A sale of Fee Fee to M.S.D. as supplying the occurrence of this necessary condition has no roots in any contract or document.

The plaintiffs ask the court as a matter of equitable relief, to create a cause of action for them where none exists as a matter of law. This cannot be done.

In a case analagous to the one at bar, the Missouri Supreme Court has held that equity will not interfere with a "windfall" reaped by a public utility in a non-ratemaking setting. In *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666 (Mo. 1950), customers of a public utility brought an action against the utility to recover an interest in certain funds received by the utility. The plaintiffs' theory of unjust enrichment was based on these facts: that the utility was paying a fixed rate for gas purchased from a pipeline company and was selling the gas to customers at a rate fixed and approved by the Missouri Public Service Commission; that the utility was prohibited by "law" (now Section 393.130) from collecting any money in excess of the established rate; and that thereafter the utility received a court-ordered refund in the cost of gas and held it under a claim of right. Although the plaintiffs in *Straube* claimed that the refund would be proceeds in excess of the rate fixed by the P.S.C., the court denied their claim, noting that the law of this state provides only for the fixing of rates and does not fix the maximum return allowed. *Strauge, supra,* at p. 666. Reiterating the rule stated earlier, the supreme court noted that where rights are clearly defined and established by law, equity has no power to "change" or "unsettle" those rights. *Straube, supra,* at p. 671.

Next asserted by the plaintiffs is that Section 393.130(1) and (3) provides statutory authority for their cause of action. Under the terms of Section 393.130(1), "all charges made or demanded by any such gas corporation, electrical corporation, water corporation or sewer corporation for gas, electricity, water, sewer

or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission." The plaintiffs, citing only to Webster's Dictionary, argue that the proceeds received by Fee Fee and its shareholders represent an "unreasonable charge" in violation of the statute. No other authority is provided.

The purpose of the Public Service Commission Law, Sections 386 through 394, RSMo 1978, is to secure equality in service in *rates* for all who need or desire these services and who are similarly situated. *May Department Stores Co. v. Union Electric Light and Power Co.,* 107 S.W.2d 41, 49 (Mo. 1937). The plaintiffs, however, seem to confuse the terms "rate" and "return". It is clear that Section 393.130, just as its predecessor (see Section 5645 RSMo (1939)), is not concerned with the return which a utility receives on the sale of its assets:

"[T]he law of the state only provides for the fixing of rates and does not fix the maximum return thereunder." *Straube, supra,* at p. 671.

Section 393.130(3) reads that no sewer company shall grant any unreasonable preference to any person or particular locality, nor subject them to any prejudice. The plaintiffs cite no authority that this portion of the law nor (1) above create a private cause of action for customers when one operating sewer company sells to another.

The other two sub-points are now mentioned. In one the plaintiffs present a two sentence explanation of the law of the remedy of constructive trusts. They do not advance any theory for the grant of such a remedy. *See Virgan v. Poelker,* 433 F.Supp. 168, 171 (D.D.Mo. 1977). Their other sub-point states the liberal standard by which a motion to dismiss is reviewed, and that they feel their petition was sufficient. These points are denied.

Plaintiffs' other points and sub-points do not constitute substantive principles of law upon which relief can be granted and the disposition of the first two points makes them academic. Therefore no extended discussion will be made as to the point dealing with statute of limitations questions as applying to the individual defendants, the method of corporate liquidation, the liability after liquidation of shareholders and directors, or the point dealing with whether or not the plaintiffs properly amended their petition, or the point concerning M.S.D.'s dismissal predicated upon the plaintiffs' motion that M.S.D. took the property after sale in a fiduciary position as to plaintiffs under Section 456.250. They are denied.

In sum, what the plaintiffs attempt to stop is the shareholders of Fee Fee getting a large sum of money for selling stock, mainly backed by the assets in question, donated by the plaintiffs and other subscribers to the sewer service. There is no such cause of action under the statutes or case law on this type of utility transaction. Their individual rates for service cannot be predicated on these contributed assets as shown by the cases. They have no property interests to be upheld where the contributions have been deeded to the sewer company. The bonds issued to pay for the sale were approved by the voters, property owners, and the PSC. No relief was sought from the PSC order. The motions to dismiss were properly sustained.

The judgment is affirmed.

All concur.

Harold L. Lowenstein,
Special Judge

Kent E. Karohl, Presiding Judge Concurs

Michael J. Hart, Special Judge Concurs

APPENDIX B

No. 65789

IN THE SUPREME COURT OF MISSOURI

ED 46121

January Session, 1984

Ray Reinhold, et al.,
Plaintiffs-Appellants,

vs.

Fee Fee Trunk Sewer, Inc., et al.,
Defendants-Respondents.

TRANSFER

Now at this day, on consideration of Plaintiffs-Appellants' Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1984, and on the 20th day of March 1984, in the above entiled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 20th day of March, 1984

Thomas F. Simon, Clerk

APPENDIX C

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. 46121

Ray Reinhold, et al.,
Plaintiffs-Appellants,

vs.

Fee Fee Trunk Sewer, Inc., et al.,
Defendants-Respondents.

NOTICE OF APPEAL

Appellants, Ray Reinhold, et al., all plaintiffs in the above cause, appeal to the Supreme Court of the United States from the final judgment of this court entered January 10, 1984 affirming dismissal of the cause of action for failure to state a claim for which relief can ge granted.

This appeal is taken pursuant to 28 U.S.C.A. §1257(3). Appellants cause of action was dismissed in spite of Section 393.130 of the Revised Statutes of Missouri entitled "safe and adequate service—charges." Appellants have claimed in their petition which was dismissed, that the defendants therein acted contrary to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

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AFFIDAVIT OF SERVICE

I, Brian Bild, attorney for Petitioners, certify that I have served all parties required to be served with this Notice of Appeal on this 12th day of June, 1984 by depositing in the U. S. Mail three properly addressed copies thereof with first class postage prepaid.

The parties so served are:

Donald J. Stohr
One Mercantile Center
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Missouri Court of Appeals
Eastern District
111No. Seventh
St. Louis, MO 63101

Brian Bild

Subscribed and sworn to before me this 12th day of June, 1984.

/s/ Janet L. Bates
Notary Public

[SEAL]
My Commission Expires:

Janet L. Bates
Notary Public State of Missouri
St. Louis Co.

My Commission Expires Aug. 15, 1984

APPENDIX D

Constitutional and Statutory Provisions Involved

U. S. Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 393.130 RSMo. 1978

393.130. Safe and adequate service—charges.—1. Every gas corporation every electrical corporation, every water corporation, and every sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation, water corporation or sewer corporation for gas, electricity, water, sewer or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

2. No gas corporation, electrical corporation, water corporation or sewer corporation shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corpora-

tion a greater or less compensation for gas, electricity, water, sewer or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

3. No gas corporation, electrical corporation, water corporation or sewer corporation shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

4. Nothing in this section shall be taken to prohibit a gas corporation, electrical corporation, water corporation or sewer corporation from establishing a sliding scale for a fixed period for the automatic adjustment of charges for gas, electricity, water, sewer or any service rendered or to be rendered and the dividends to be paid stockholders of such gas corporation, electrical corporation, water corporation or sewer corporation; provided, that the sliding scale shall first have been filed with and approved by the commission; but nothing in this subsection shall operate to prevent the commission after the expiration of such fixed period from fixing proper, just and reasonable rates and charges to be made for service as authorized in sections 393.110 to 393.285.

5. No water corporation shall be permitted to charge any municipality or fire protection district a rate for the placing and providing of fire hydrants for distribution of water for use in protecting life and property from the hazards of fire within such municipality or fire protection district. Nothing herein shall prevent such water corporation from including the cost of

placement and maintenance of such fire hydrants in its cost basis in determining a fair and reasonable rate to be charged for water. Any such fee or rental charge being made for such fire hydrants whether by contract or otherwise at the time this act shall take effect may remain in effect for a period of one hundred twenty days after this section shall take effect.